IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

THURSDAY, THE 8TH MARCH 2007 / 17TH PHALGUNA 1928

CRL.A.No. 2449 of 2006()

SC.153/2006 of ADDL. SESSIONS COURT (ADHOC)-II, THODUPUZHA.

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APPELLANT: ACCUSED

MANIKANDAN, S/O. NAGAN,
HOUSE NO.11/210, CHAKKUPALLAM PANCHAYATH,
SASTHANDA KARA, ANAKKARA VILLAGE.

BY ADV. SRI.LATHEESH SEBASTIAN

RESPONDENT: STATE

STATE OF KERALA, REPRESENTED BY
THE DIRECTOR OF PUBLIC PROSECUTIONS,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. P. RAVINDRA BABU

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 08/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER IN CRL.M.A.NO.13051 OF 2006 IN CRL. APPEAL NO. 2449 OF 2006.

DISMISSED

8.3.2007 Sd/-(K.THANKAPPAN, JUDGE)

K.THANKAPPAN, J.

CRL. APPEAL NO. 2449 OF 2006

Dated this the 8th day of March, 2007

JUDGMENT

This appeal is filed against the judgment in Sessions Case No.153 of 2006 on the file of the Additional Sessions Court (Adhoc) II, Thodupuzha. The appellant faced trial for the offence punishable under Section 376 I.P.C.

2. The prosecution case against the appellant was that the appellant committed rape on PW.2 at her house at 10.30 a.m. on 18.7.2004. To prove the above charge, the prosecution examined PWs.1 to 11 and produced Exts.P1 to P13 as well as MO.1. No oral or documentary evidence was adduced on the side of the defence. After closing the prosecution evidence, the appellant was questioned under Section 313 Cr.P.C. The appellant denied the allegations levelled against him and stated that the case was foisted against him by PWs.3 and 4 on account of their enmity towards him and PW.1, the father of the victim. However, the trial court relied on the evidence adduced by the prosecution and found

the appellant guilty under Section 376 I.P.C., convicted him thereunder and sentenced him to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.5000/- and in default of payment of fine, to undergo rigorous imprisonment for a further period of six months. The above conviction and sentence are challenged in this appeal.

3. This Court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor.

4. Learned counsel appearing for the appellant submits that the trial court went wrong in relying on the evidence of PWs.2 to 4 to find the appellant guilty of the offence charged against him. Counsel further submits that the trial court ought to have considered the fact that the victim was a consenting party to the offence. Further, counsel submits that the sentence awarded by the trial court is excessive.

5. According to the prosecution, the appellant committed rape on PW.2 in her house and the appellant was detained by the persons who gathered at the place of occurrence. PW.1, the father of PW.2 gave Ext.P1 first information statement to the effect that the appellant committed rape on his mentally retarded daughter. Even though this witness turned

hostile to the prosecution, he admitted his signature in Ext.P1.

6. PW.2 was the victim. It was stated in Ext.P1 first information statement that PW.2 was mentally retarded. She stated before the court below that on the day of the incident, the appellant came to the house and asked for black coffee. She further stated that she gave him coffee and then the appellant closed the door, made her lie on the cot and committed rape on her,. This witness further stated that the appellant and her father were friends and that when she resisted the attempt of the appellant, he threatened her with dire consequences.

7. PW.3 who was a neighbour stated that she peeped through the window and saw the appellant and PW.2 lying on a cot. She further stated that she then called PW.4 who also came to the spot. The evidence given by PW.3 is corroborated by the evidence of PW.4. PW.5 was examined to prove Ext.P2 scene mahazar prepared by the police. PW.6 was the doctor who examined PW.2 on 18.7.2004 on the basis of the requisition made by the police and issued Ext.P5 medical certificate. This witness stated that though there were no injuries on the body of PW.2, there were signs showing recent sexual intercourse. She further deposed that the victim had stated that the appellant committed rape on her. Ext.P6 is the potency

certificate in respect of the appellant which shows that the appellant was capable of sexual intercourse. PW.7, the Tahsildar was examined to prove Ext.P7 caste certificate in respect of PW.2. PW.8 , the Headmistress of the school where PW.2 had studied was examined to prove Ext.P8 extract of school admission register in which the date of birth of PW.2 is shown as 15.4.1988. PW.9, the Village Officer proved Ext.P9 scene plan. PWs.10 and 11 were the police officials who recorded the statement of PW.1 and conducted investigation of the case.

8. The questions to be decided in this appeal are whether PW.2 was a consenting party to the offence and whether the evidence adduced by the prosecution is sufficient to prove the case against the appellant.

9. The contention of the learned counsel appearing for the appellant is that PW.2 resisted the attempt of the appellant only when PWs.3 and 4 came to the spot and that till then she was a willing partner. Hence, according to counsel, the alleged offence was committed with the consent of PW.2. It has come out in evidence that PW.2 was not mentally developed so as to understand the consequences of the act committed by the appellant. The trial court found that PW.2 cannot be considered as a consenting party as per the provisions contained in Section 375 I.P.C.

The fifth clause of Section 375 I.P.C. reads as follows:

> "**375. Rape.--** A man is said to commit "rape" who, except in the case hereinafter excepted, has intercourse with a woman under circumstances falling under any of the six following descriptions:
>
> xx xx xx xx
>
> fifthly.--With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent."

The above provision would clearly show that even if any consent was given by the victim in a rape case, it cannot be considered as consent if at the time of giving such consent, the victim was unable to understand the nature and consequences of the act to which she had given consent on account of the reasons mentioned in the said provision. From the evidence adduced by the prosecution, it is clear that the victim was a person whose mental faculties were not developed. In this context the decision of the Apex Court reported in **Tulshidas Kanolkar v. State of Goa (2003)8 S.C.C. 590** is relevant. In paragraph 6 of the above judgment, the Apex Court held as follows :

> "..... A mentally challenged girl cannot legally give a consent which would necessarily involve understanding of the effect of such consent. It has to be a conscious and voluntary act. There is a gulf of difference between consent and submission. Every consent involves a submission but the converse does not follow, and mere act of submission does not involve consent. An act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance or passive giving-in when the faculty is either clouded by fear or vitiated by duress or impaired due to mental retardation or deficiency cannot be considered to be consent as understood in law. For constituting consent, there must be exercise of intelligence based on the knowledge of the significance and the moral effect of the act. A girl whose mental faculties are undeveloped, , cannot be said in law, to have suffered sexual intercourses with consent."

In the light of the above observation of the Apex Court, this Court is of the view that PW.2 was not a consenting party to the offence.

10. The next question to be considered is whether the evidence adduced by the prosecution was sufficient to prove the guilt of the appellant. The trial court accepted the evidence of PWs.2 to 4 and 6 and their evidence was not shattered even in cross-examination. The evidence of PW.2 itself is enough to prove that the appellant committed rape on her.

Hence, the finding of the trial court in this regard is fully justified.

11. Now coming to the sentence awarded, it is seen that as per Section 376 I.P.C., the minimum punishment for an offence under the said section is imprisonment of either description for a term which shall not be less than seven years and also liable to fine. The court below after considering the entire facts and circumstances of the case found that rigorous imprisonment for five years and a fine of Rs.5000/- would be sufficient to meet the ends of justice. There exists no special circumstance to warrant a lesser punishment. Hence, the impugned judgment requires no interference.

The Crl. Appeal is accordingly dismissed, confirming the conviction and sentence awarded by the court below.

(K.THANKAPPAN, JUDGE)

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